



**Kamwere v Speaker National Assembly & 5 others (Petition E399 of 2021)
[2023] KEHC 3978 (KLR) (Constitutional and Human Rights) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E399 OF 2021

M THANDE, J

APRIL 28, 2023

BETWEEN

JAMES KAMWERE PETITIONER

AND

THE SPEAKER NATIONAL ASSEMBLY 1ST RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY 2ND RESPONDENT

**THE DEPARTMENTAL COMMITTEE ON LANDS OF THE NATIONAL
ASSEMBLY 3RD RESPONDENT**

HON JOSHUA KUTUNY 4TH RESPONDENT

**MARGARET W MAGUGU (THE ADMINISTRATRIX OF THE ESTATE OF
ARTHUR K MAGUGU) 5TH RESPONDENT**

HON ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. By an Application dated 22.2.22, the 6th Respondent seeks to be struck out of the proceedings herein under Rule 5(d) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (Mutunga Rules).
2. The 6th Respondent contends that he is not a necessary party in the Petition herein filed by the Petitioner, as none of the 5 prayers sought therein is against the 6th Respondent. The Petitioner does not allege any violation of his rights and freedoms by the 6th Respondent. The dispute is primarily between the Petitioner and the 5th Respondent. The 6th Respondent's presence in the proceedings is not required to enable the Court adjudicate upon and determine the dispute. The 6th Respondent has



thus been improperly joined in the proceedings and subjected to an unnecessary, expensive and tedious court process. It is therefore in the interest of justice that the 6th Respondent be struck out from the proceedings.

3. The Application is opposed by the Petitioner who contends that the 6th Respondent is the principal legal advisor of the Government under Article 156(4) of the *Constitution*. As such the 6th Respondent's inclusion in the proceedings herein is due to the significance and weight of the matter in the Petition. Although no reliefs are sought against the 6th Respondent, Article 156(5) grants him authority to enter into suits in which the Government is not a party. The Petitioner further contends that the 6th Respondent is duty bound by the *Constitution* to protect the public interest matters raised in the Petition. Further that the Court may under Rule 7(2) of the *Mutunga Rules* remove the 6th Respondent as a respondent, and make it an interested party, with a view to having its views heard with regard to the public interest in the Petition.
4. The 6th Respondent contends that it represents the National Government in civil proceedings while Parliament, the legislative arm of government has its own advocates to represent both houses of in court proceedings. The 6th Respondent is not privy to the internal communication or any other information that would be of use to the Court. Thus, given the enormous responsibility placed on the 6th Respondent in executing its constitutional mandate, it would be improper use of valuable time and public resources to retain the 6th Respondent in the matter herein.
5. The record shows that the dispute in the Petition arises from survey work done by the on instructions by the 5th Respondent's husband, Arthur K. Magugu (deceased). The 5th Respondent in her capacity as administratrix of her husband's estate filed ELC Case No. 159 of 2017 against the Petitioner and others, which case was dismissed on 20.11.17. Being aggrieved by the decision, she filed Civil Appeal No. 3 of 2018 which was dismissed on 5.4.19. She then applied for certification for leave to appeal to the Supreme Court in Civil App. Supp. No. 10 of 2019. Thereafter, the 4th and 5th Respondent filed Public Petition No. 25 of 2021 in the National Assembly and the Petitioner was summoned to appear before the 3rd Respondent.
6. In his Petition, the Petitioner seeks the following orders:
 - a. A Conservatory Order staying any further action by the 3rd Respondent on the Public Petition No. 25 of 2021.
 - b. A Declaration that the 4th and 5th Respondent's Petition being Public Petition No. 25 of 2021 is *ultra vires*.
 - c. An Order of *Certiorari* to bring to this Court for the purpose of quashing 4th and 5th Respondent's Petition being Public Petition No. 25 of 2021.
 - d. An Order of Prohibition against the 1st, 2nd and 3rd Respondents prohibiting the 1st, 2nd and 3rd Respondents to entertain any Petition or investigation against the Petitioner in relation to any dealings in regard to the subdivision of L. R. No. 12422/204 and the registration of L. R. No. 12422/318 and L. R. No. 12422/319.
 - e. Damages to be ascertained by the Honourable Court.
 - f. Costs.



7. It is quite evident from the foregoing that there is no order sought against the 6th Respondent. Indeed, in the contraventions listed in the Petition, none relate to the 6th Respondent. The Petitioner has not attributed any act or omission on the part of the 6th Respondent that has violated or infringed on his rights and fundamental freedoms.
8. The role played by the Attorney General as an institution within the executive arm of Government in Kenya is no doubt an important one. The Office of the 6th Respondent is established under Article 156(1) of the Constitution. Article 156(4) stipulates the mandate of the 6th Respondent as follows:
- (4) The Attorney-General—
- (a) is the principal legal adviser to the Government;
 - (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
 - (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.
9. As the principal legal adviser to the Government, the 6th Respondent is required to represent the national government in civil proceedings in which the national government is a party. Quite evidently the Constitution does not require the 6th Respondent to represent Parliament in proceedings, nor does any Act of Parliament.
10. In this regard, I associate with the sentiments expressed by Lenaola, J. (as he then was) in the case of Okiya Omtatah Okoiti & another v Attorney General & 7 others [2013] eKLR. The learned Judge had this to say about the role of the 6th Respondent:
- the Constitution and the enabling Act have deliberately limited the role of the Attorney-General to that of advise and representation of National Government in Court proceedings other than civil proceedings. This means for example that County Governments may not have the benefit of that advise and representation for the simple reason that they are not part of the National Government.
11. The Petitioner argued that the 6th Respondent is granted authority to enter into suits in which the Government is not a party under Article 156(5) which provides as follows:
- The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party
12. A careful reading of the above provision shows that the authority granted therein is for the 6th Respondent to appear as a friend of the court in proceedings where the Government is not a party. It is now well settled that the Court may call upon the 6th Respondent to appear as amicus curiae in a case involving issues of great public interest. In the case of Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR the Supreme Court stated that “An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.”
13. In the present case, the Petitioner although relying on Article 156(5) has not asked that the 6th Respondent be joined as amicus curiae. Indeed, the 6th Respondent does not wish to remain in the proceedings. Further, the Petitioner has not demonstrated the great public interest warranting the



joinder of the 6th Respondent nor has he demonstrated that the 6th Respondent will address points of law not addressed by parties or introduce novel aspects of the legal issues in question that aid the development of the law. I am also doubtful that Article 156(5) contemplates that a party in any proceedings can make an application on behalf of the 6th Respondent to appear as a friend of the Court.

14. Section 7 of the [Office of The Attorney-General Act](#) makes provision for audience by Attorney-General in matters of public interest as follows:
 1. Despite the provisions of any written law to the contrary or in the absence of any other written law, the Attorney-General shall have the right of audience in proceedings of any suit or inquiry of an administrative body which the Attorney-General considers—
 - a. to be of public interest or involves public property; or
 - b. to involve the legislature, the judiciary or an independent department or agency of the Government.
 2. In the exercise of the powers of the Attorney-General under subsection (1), the Attorney-General shall—
 - a. notify any court, tribunal or any other administrative body of the intention to be enjoined to the suit, inquiry or administrative proceedings; and
 - b. satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the Office.
 3. Where a suit, inquiry or any other proceedings is pending before a court, tribunal or any other administrative body to which the Attorney-General does not have a right of audience, it shall be sufficient for the Attorney-General to file a certificate of the intention of the Attorney-General to be joined in the proceeding.
 4. The court, tribunal or any such administrative body shall, upon receipt of a certificate under subsection (3), enjoin the Attorney-General in the proceedings.
15. Section 7(1) confers upon the Attorney-General, the right of audience in any suit, inquiry of an administrative body which the Attorney-General considers to be of public interest or involves public property or to involve the legislature, the judiciary or an independent department or agency of the Government.
16. For the Attorney General to have the audience contemplated under subsection (1) before a court, Section 7(2) requires the Attorney-General to notify such court of the intention to be joined in the proceedings and further satisfy the court of the public interest involved, and comply with any direction the court may give on the nature of pleadings or measures to be taken for the Attorney General's effective discharge of its duties.
17. In the case of [Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Attorney General \(Intended Amicus Curiae\) \(Presidential Election Petition 1 of 2017\)](#) [2017] KESC 36



(KLR) (Election Petitions) (27 August 2017) (Ruling), the Supreme Court considered the role of the Attorney-general under Article 156(5) and stated:

The Office of the Attorney General is an integral part of the National Executive and bears the privilege of Executive Authority but is bound by the necessary and sacred strictures of exercise of that power: it must be exercised in a manner compatible with the principle of service to the people of Kenya, for their well-being and benefit pursuant to article 129(2).

However, section 7(2) of the Office of the *Attorney General Act*, mandates the Attorney General to satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the Office.

The Attorney General has satisfied this court, by the very nature of the proceedings, that issues of public interest are involved. He has also elected to be enjoined in these proceedings as a friend of the court.

18. For the 6th Respondent to be joined in any proceedings as a friend of the court, it must seek to be so joined and must satisfy the court of the public interest involved.
19. I have carefully read the Petition herein. The Petition seeks in effect to stop the proceedings against him and others before the 3rd Respondent. The petition before the 3rd Respondent was filed by a private citizen advancing private interests. No public interest has thus been disclosed. Further the 6th Respondent has not sought to be joined in these proceedings. There is therefore no necessity for the need for the 6th Respondent to be in these proceedings. Without any allegations being made or orders being sought against the 6th Respondent, there is no basis for the 6th Respondent to remain in these proceedings.
20. Rule 5(d) of the *Mutunga Rules* provides as follows, regarding joined and striking out of parties:

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

 - i. order that the name of any party improperly joined, be struck out; and
 - ii. that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
21. The Court has the discretionary power to either strike out any party that is improperly joined or add any person who ought to have been joined or whose presence in the proceedings is necessary for adjudication and settlement of a matter before the Court. This may be done on the application of either party or on the Court's own motion. Joinder or striking out of a person or party may be done at any stage of the proceedings.
22. Having found as I have, that the 6th Respondent's presence in the proceedings herein is not necessary for the adjudication and settlement of the Petition, the inevitable conclusion this Court makes, is that the 6th Respondent has been improperly joined herein.
23. In exercise of the discretion under Rule 5(d) of the *Mutunga Rules* therefore, I allow the Application dated 22.2.22 with the result that the 6th Respondent is hereby struck out of the proceedings herein. The 6th Respondent shall have costs.



DATED AND DELIVERED IN NAIROBI THIS 28TH DAY OF APRIL 2023

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M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner

..... for the Respondents

.....Court Assistant

